

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DELIA ALANIZ,)	CASE NO. C06-0558-RSL
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY
JO ANNE B. BARNHART, Commissioner)	DISABILITY APPEAL
of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Delia Alaniz proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Supplemental Security Income (SSI), Disability Insurance (DI) benefits, and Childhood Disability Benefits (CDB) after a hearing before an Administrative Law Judge (ALJ).

Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be REMANDED for further administrative proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1979.¹ She completed at least the tenth grade at an alternative school, but did not graduate or obtain a GED. Plaintiff previously worked as a server, seasonal toy assembler, aide at a facility for disabled persons, attendant at homeless shelters, and delivery driver.

With a filing month of March 2003, plaintiff filed applications for SSI, DI benefits, and CDB. (AR 61-63, 335-38, 349-50.) She alleged disability since August 1, 2002 on her SSI and DI applications and since November 1, 2001 on her CDB application.² Her applications were denied at the initial level and on reconsideration, and she timely requested a hearing.

On August 8, 2005, ALJ Edward P. Nichols held a hearing, taking testimony from plaintiff, her mother Delia Piya, and vocational expert (VE) Lynn Dankel. (AR 357-99.) On October 14, 2005, ALJ Nichols issued a decision finding plaintiff not disabled. (AR 16-26.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on March 15, 2006, making the ALJ's decision the final decision of the Commissioner. (AR 7-10.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

² To receive CDB benefits, a claimant over the age of eighteen must establish disability began prior to the age of twenty two. 20 C.F.R. § 404.350(a)(5). Therefore, with respect to her CDB application, plaintiff needed to establish disability beginning on or before her twenty second birthday, in late 2001.

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since her alleged onset date of November 1, 2001. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's posttraumatic stress disorder (PTSD), depression, substance abuse, and anxiety disorder severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff's RFC and found her able to perform her past relevant work as a delivery driver and assembler. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to step five.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750

01 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
02 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
03 2002).

04 Plaintiff argues generally that the vast weight of the evidence requires a finding of
05 disability. Specifically, she asserts that the ALJ erred in giving more weight to the opinions of
06 one-time consultative examiners than to her treating psychiatrist, in assessing her credibility, in
07 finding her capable of returning to her past relevant work, and in failing to fully develop the
08 record. Plaintiff also cursorily states in her conclusion that the ALJ failed to properly consider lay
09 witness testimony. She requests remand for an award of benefits or, alternatively, for further
10 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by
11 substantial evidence and should be affirmed.

12 The Court has discretion to remand for further proceedings or to award benefits. *See*
13 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits
14 where "the record has been fully developed and further administrative proceedings would serve
15 no useful purpose." *McCartey v. Massanari* 298 F.3d 1072, 1076 (9th Cir. 2002).

16 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient
17 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that
18 must be resolved before a determination of disability can be made; and (3) it is clear
19 from the record that the ALJ would be required to find the claimant disabled if he
20 considered the claimant's evidence.

19 *Id.* at 1076-77.

20 Physicians' Opinions

21 In general, more weight should be given to the opinion of a treating physician than to a
22 non-treating physician, and more weight to the opinion of an examining physician than to a non-

01 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
02 by another physician, a treating or examining physician's opinion may be rejected only for "clear
03 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
04 Where contradicted, a treating or examining physician's opinion may not be rejected without
05 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."
06 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion
07 of the treating physician is contradicted, and the non-treating physician's opinion is based on
08 independent clinical findings that differ from those of the treating physician, the opinion of the
09 non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d
10 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id.*

11 Plaintiff challenges the ALJ's decision to give "little weight" to the opinions of her treating
12 psychiatrist, Dr. Agnes Koesis. (AR 23-24 and 333.) Plaintiff states that Dr. Koesis had the
13 benefit of case notes and medical records covering a near eighteen-month period and clearly
14 opined that she is unable to work due to severe bipolar disorder and PTSD. Plaintiff notes that,
15 in contrast, the examining physicians upon whose opinions the ALJ relied, Drs. Mark Koenen and
16 Norman Gustavson, saw her only once each. (AR 228-33, 250-55.) She adds that Dr. Gustavson
17 assessed chronic and severe PTSD and a Global Assessment of Functioning (GAF) of 45-50,
18 indicating severe symptoms or serious impairment. (AR 250-55.) Plaintiff avers that the ALJ was
19 required to give more weight to the opinion of Dr. Koesis and that he failed to provide specific
20 and legitimate reasons for rejecting that physician's opinions, other than to question plaintiff's
21 veracity in reporting. (*See* AR 23-24.)

22 The Commissioner responds that even a treating source's opinions are not entitled to

controlling weight where not “well-supported by medically acceptable clinical and laboratory diagnostic techniques,” Social Security Ruling (SSR) 96-2p, and that the determination of whether someone is disabled is ultimately reserved to the Commissioner, SSR 96-5p. The Commissioner argues the sufficiency of the ALJ’s reasoning, pointing to, among other things, the ALJ’s notation that the record did not include any treatment notes from Dr. Koesis, and that evidence of plaintiff’s activities suggested greater capability in social functioning than reflected in Dr. Koesis’s opinion regarding plaintiff’s anxiety.

In reply, plaintiff reiterates that Dr. Koesis had access to her records from previous treatment at the same facility. (*See* AR 273-300.) Those records include the notes of plaintiff’s previous treating physician, Dr. Elizabeth Noll. (*See, e.g.*, AR 293-300.) Plaintiff also points to her testimony reflecting that her periodic attempts to socialize were for the most part unsuccessful. (*See, e.g.*, AR 370-71, 374, 382-83.)

The record contains a letter from Dr. Koesis dated August 8, 2005, stating in relevant part:

Delia Alaniz is diagnosed with Severe Bipolar Disorder and [PTSD]. Patient, at this time, I feel, is unable to work. She suffers from mood lability with minimal improvement on medications. In addition, patient experiences severe anxiety and paranoia in social situations which would most likely manifest in the workplace setting. Patient’s post traumatic [stet] is usually triggered by loud noises, pressure of responsibility, pressure to perform the most simple tasks, and males who remind her of her abuser.

(AR 333.) The ALJ assessed the opinions of Dr. Koesis, as well as Drs. Koenen and Gustavson, as follows:

Dr. Koesis has opined that the claimant is disabled. She is apparently the claimant’s current treating psychiatrist after Dr. Noll left, but there are no treatment notes from her. The claimant apparently told Dr. Koesis that her traumatic memories were triggered by males who reminded her of her abuser, but no records record this. She said that the claimant experienced severe anxiety in social situations, but the claimant

01 attends barbecues[,] goes to the park with friends, goes shopping and visits her
02 mother and brothers regularly. This suggests that she is more capable of functioning
03 socially than she has reported to Dr. Koesis, and again it appears the Doctor is relying
on a source (the Claimant) of highly questionable veracity, hence her opinion is
entitled to little weight as its foundation is flawed.

04 Dr. Gustavson and Dr. Koenen have opined that the claimant is able to function with
05 limited supervisor, coworker contact and in only simple and repetitive tasks. This is
also consistent with the evaluations from the State Agency.

06 (AR 23-24.)

07 Plaintiff fails to demonstrate reversible error in the ALJ's assessment of these physicians'
08 opinions. While plaintiff correctly points out Dr. Koesis's access to prior treatment notes, the
09 ALJ's comment is nonetheless accurate – there are no treatment notes from Dr. Koesis in the
10 record. Also, the ALJ does provide reasons for rejecting the opinions of Dr. Koesis, including the
11 fact that one of her statements is not supported by the record and that plaintiff's reported activities
12 belie this physician's statement regarding the extent of plaintiff's anxiety. Although plaintiff
13 testified that her attempts to socialize were largely unsuccessful, the ALJ did not find plaintiff
14 particularly credible, as discussed below. (*See* AR 23.) Plaintiff does not demonstrate that the
15 ALJ erred in relying, in part, on a finding that Dr. Koesis's opinions rested on a "flawed"
16 foundation. (AR 24.)³ Finally, although the findings attributed to both Dr. Gustavson and Dr.

17
18 ³ Plaintiff points to *Reddick v. Chater*, 157 F.3d 715, 725-26 (9th Cir. 1998), in which the
19 Ninth Circuit criticized an ALJ's rejection of physicians' opinions because they were based on the
20 subjective complaints of a claimant found not very credible. However, in that case, the Court
21 found such a rejection "ill-suited" to the chronic-fatigue syndrome at issue, a condition with
22 symptoms necessarily self-reported. *Id.* Also, the Court noted, *inter alia*, that one of the
physicians had followed the claimant's "progress for three and a half years, referred her to several
specialists and conducted extensive lab testing to rule out other possible illnesses." *Id.* at 726.
These factors distinguish *Reddick* from the facts of this case. *See also Bayliss v. Barnhart*, 427
F.3d 1211, 1217 (9th Cir. 2005) (upholding ALJ's decision to not rely on physicians' opinions
based, in part, on their reliance on the claimant's subjective complaints).

01 Koenen appear to come from the report of Dr. Koenen, Dr. Gustavson, while assessing a GAF
02 indicating severe symptoms or serious impairment, also found “no significant limitation in
03 [plaintiff’s] ability to handle daily living skills.” (AR 255.)⁴

04 In sum, the ALJ provided specific and legitimate reasons for according little weight to the
05 opinions of Dr. Koesis and rationally relied on the contrary opinions of at least one examining
06 physician and two non-examining physicians.

07 Credibility

08 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
09 reject a claimant’s testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*
10 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant’s testimony unreliable, an
11 ALJ must render a credibility determination with sufficiently specific findings, supported by
12 substantial evidence. “General findings are insufficient; rather, the ALJ must identify what
13 testimony is not credible and what evidence undermines the claimant’s complaints.” *Lester*, 81
14 F.3d at 834. “We require the ALJ to build an accurate and logical bridge from the evidence to her
15 conclusions so that we may afford the claimant meaningful review of the SSA’s ultimate findings.”
16 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). “In weighing a claimant’s credibility, the
17 ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between
18 his testimony and his conduct, his daily activities, his work record, and testimony from physicians
19 and third parties concerning the nature, severity, and effect of the symptoms of which he
20

21 ⁴ It is difficult to discern the opinions of Dr. Gustavson from his report. Rather than
22 assessing plaintiff’s limitations, he focuses primarily on the appropriate diagnoses of her
impairments. (*See* AR 250-55.)

01 complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

02 The ALJ rendered the following credibility decision in this case:

03 I do not find the claimant particularly credible. The claimant has commented that she
04 does not want to go back to school. She has said that she does not want to work
05 because none of her friends work. Before she left her last job, she told her counselor
06 that she hated the job, suggesting that her failure to show up for work could have
07 been largely volitional. When the claimant feels that she has to do something, she
08 apparently does it well, as she was able to care for her mother when she was
09 recovering from surgery. She was also asked to care for her cousin’s baby,
10 suggesting that people trust her not to lose her temper. While she talks about
isolating herself, she has talked about going out with friends and mentioned going to
barbecues at the hearing. She has traveled to Mexico for six weeks. She does have
a history of impulsive behavior and inability to get along with people. Substance
abuse probably continues to play a role in her impairments. She was very vague at the
hearing concerning this issue. The claimant appears to be able to do what she wants
to, but like Melville’s *Bartelby the Scrivener*, she prefers not to work.

11 (AR 23.) Also, in addition to questioning plaintiff’s veracity in assessing the opinions of Dr.
12 Koesis, the ALJ stated the following in giving no weight to the report of another physician: “The
13 claimant is not credible, and appears easily capable of telling a doctor what she feels will get her
14 what she wants.” (*Id.*)

15 Plaintiff argues that the ALJ ignored or misinterpreted evidence indicating her disability.
16 She again points to evidence suggesting her unsuccessful attempts to socialize and states that the
17 ALJ speculated as to, rather than developed the nature of the situations involving her care for her
18 mother and a request to care for a cousin’s child.

19 However, as argued by the Commissioner, plaintiff fails to demonstrate error in the ALJ’s
20 credibility assessment. The ALJ appropriately pointed to inconsistencies between plaintiff’s
21 testimony and evidence of her conduct, activities, and past work record. *See Light*, 119 F.3d at
22 792. The ALJ also legitimately pointed to plaintiff’s past comments regarding work. *See, e.g.,*

01 *Thomas*, 278 F.3d at 959 (upholding credibility assessment in which “the ALJ found that Ms.
02 Thomas had an ‘extremely poor work history’ and ‘has shown little propensity to work in her
03 lifetime,’ which negatively affected her credibility regarding her inability to work.”); *Bruton v.*
04 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (upholding rejection of plaintiff’s subjective pain
05 testimony based, in part, on the fact that the claimant “stated at the administrative hearing and to
06 at least one of his doctors that he left his job because he was laid off, rather than because he was
07 injured.”) Nor does plaintiff establish that it was in any way inappropriate for the ALJ to point
08 to plaintiff’s care for her mother and to the request that she care for a cousin’s child as evidence
09 inconsistent with her alleged level of impairment. For these reasons, the ALJ’s credibility
10 assessment is supported by substantial evidence and should be upheld.

11 Past Relevant Work

12 Plaintiff maintains that the ALJ erred in finding her able to return to her past relevant work.
13 She first points to SSR 82-62 as requiring a “careful appraisal” of:

14 (1) the individual’s statements as to which past work requirements can no longer be
15 met and the reason(s) for his or her inability to meet those requirements; (2) medical
16 evidence establishing how the impairment limits ability to meet the physical and
17 mental requirements of the work; and (3) in some cases, supplementary or
corroborative information from other sources such as employers, the *Dictionary of*
Occupational Titles, etc., on the requirements of the work as generally performed in
the economy.

18 SSR 82-62. This ruling further states:

19 Adequate documentation of past work includes factual information about those work
20 demands which have a bearing on the medically established limitations. Detailed
21 information about strength, endurance, manipulative ability, mental demands and
22 other job requirements must be obtained as appropriate. This information will be
derived from a detailed description of the work obtained from the claimant, employer,
or other informed source.

01 *Id.* Finally, plaintiff points to the requirement stated in this SSR that a decision finding a claimant
02 capable of returning to past relevant work must contain a “finding of fact” as to, *inter alia*, “the
03 physical and mental demands of the past job/occupation.” *Id.* She next points to SSR 82-61 as
04 stating that an individual will be found disabled upon a determination that he or she retains the
05 RFC to perform either “[t]he actual functional demands and job duties of a particular past relevant
06 job; or . . . [t]he functional demands and job duties of the occupation as generally required by
07 employers throughout the national economy.”

08 Plaintiff argues that the ALJ failed to provide a finding of fact as to the mental demands
09 of her past jobs or to compare her psychological limitations with the work demands of her past
10 relevant work. She states that neither testimony, nor documentary evidence offers any significant
11 indication as to the mental requirements of her past relevant work. Plaintiff adds that neither the
12 actual details of her past relevant work, nor the details as to that work as generally required by
13 employers in the national economy were established in the record.

14 The Commissioner first notes that plaintiff bears the burden of showing she can no longer
15 perform her past relevant work. *Barnhart v. Thomas*, 540 U.S. 20, 25 (2003). The Commissioner
16 further notes that plaintiff described her work as an assembler and that the VE discussed the
17 delivery job duties. (*See* AR 364, 388-89.) The Commissioner asserts that the ALJ properly
18 discredited alleged limitations found not credible and accounted for any credible limitations
19 supported by the record. *See, e.g., Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005)
20 (“The hypothetical that the ALJ posed to the VE contained all of the limitations that the ALJ
21 found credible and supported by substantial evidence in the record. The ALJ’s reliance on
22 testimony the VE gave in response to the hypothetical therefore was proper.”) The Commissioner

01 avers that the ALJ's finding that plaintiff could perform her past relevant work in light of her RFC
02 was based on substantial evidence and should be upheld.

03 Again, plaintiff does not demonstrate reversible error. The ALJ's discussion of plaintiff's
04 RFC and past relevant work was rather cursory:

05 Accordingly, I find the claimant retains the [RFC] to perform simple, repetitive,
06 structured work that is primarily performed alone with limited contact with the public,
coworkers or supervisors.

07 . . .

08 The evidence in this case establishes that the claimant has past relevant work as a
09 delivery driver and assembler. I note that, according to the claimant's testimony, she
left the job as a driver due to car problems and not due to any problems related to her
impairment.

10 The impartial [VE] testified that based upon the claimant's [RFC], the claimant could
11 return to her past relevant work as assembler and movie delivery person. She said
that these jobs would only have minimal, superficial contact with the public.

12
13 (AR 24.) However, the ALJ previously discussed the medical record and plaintiff's testimony in
14 detail, finding plaintiff's testimony as to her limitations not particularly credible and assessing only
15 the above-described limitations. (See AR 18-24.) This discussion suffices as the "careful
16 appraisal" called for in SSR 82-62. Also, although again rather cursory, the ALJ did make the
17 required finding of fact as to the demands of plaintiff's past relevant work, noting those positions
18 required "only . . . minimal, superficial contact with the public[.]" assessing plaintiff's RFC as
19 described above, and finding that plaintiff's "past relevant work as assembler and movie delivery
20 person did not require the performance of work-related activities precluded by her [RFC]." (AR

01 24-25.)⁵

02 Also, as argued by the Commissioner, the record contains information sufficient to satisfy
03 SSR 82-61 and SSR 82-62 with regard to the particulars of plaintiff's past relevant work as an
04 assembler and movie delivery person. Plaintiff testified regarding her work as an assembler:

05 I was at assembly, I was at, I wasn't at the warehouse I was at a other area, I was in
06 Rainier where I was assembling stuff like the LEGOs and the toys like everything that
07 went on the internet. Like I would assemble the stuff and then the photographers
08 would come and take pictures of it and put on the internet so everything now was on
09 the internet, I would take, I'd put it together first. Like the swimming pools I'd blow
10 them up.

09 (AR 364.) The VE testified both as to the job duties of a movie delivery person generally and
10 more specifically the extent to which such a job required contact with the public:

11 Q So movie delivery, wouldn't you be picking up movies for the employer and delivering
12 them to people?

13 A Yes.

14 Q And driving around and around and [INAUDIBLE]

15 A Yes.

16 Q The public?

17 A I would say that would be superficial contact with the public, it wouldn't be extended
18 contact. I think there'd be a lot of time in between.

19 . . .

20 A I've looked at the delivery, the movie delivery as being superficial contact and maybe, I
21 don't know that that fits the minimum description but I would look at it as superficial and
22 really minimal and it falls into a classification like for example people that deliver and pick

⁵ It should be noted that the ALJ did not assess, nor does plaintiff contest the existence of any severe physical impairments.

up lab supplies or lab samples and there's very limited contact with the public.

ALJ: Deliver the product, sign the papers and leave?

VE: Right, right. So if a person could do I mean if they could minimal they could do that, I would say that would be within that limitation.

(AR 388-89 (also further elaborating as to "superficial" contact.)) (*See also* AR 387 (VE testified that movie delivery work was light, unskilled work.)) Moreover, as indicated by the ALJ, plaintiff testified that she lost the movie delivery job based on car problems and that she was not having any problems performing that job. (AR 367.)

Given all of the above, plaintiff fails to demonstrate any reversible error either in the assessment of her RFC or the ALJ's determination that plaintiff could perform her past relevant work. While the ALJ's step four assessment could have been more detailed, it is sufficient and supported by substantial evidence.

Developing the Record

Plaintiff argues that the ALJ failed to fully develop the record in this case. In particular, she points to the ALJ's dismissal of Dr. Koesis's opinion based on its allegedly flawed foundation and absence of treatment notes. The Commissioner responds that "[a]n ALJ's duty to develop the record further is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001). In reply, plaintiff notes an ALJ's obligation to recontact a treating physician or psychologist when the evidence received is inadequate for a determination of disability, 20 C.F.R. §§ 404.1512(e), 416.912(e), and maintains that the ALJ clearly found the evidence from Dr. Koesis inadequate in pointing to the absence of treatment notes from this

01 physician.

02 As stated above, the ALJ accurately noted the absence of treatment notes from Dr. Koesis.
03 (AR 23.) This notation does not necessarily establish that the ALJ found the evidence from Dr.
04 Koesis inadequate or ambiguous. In fact, the ALJ went on to provide several unrelated reasons
05 for assigning little weight to this physician's opinions. The ALJ also adequately addressed the
06 treatment records from Dr. Koesis's predecessor. (*See, e.g.*, AR 20.) As such, plaintiff fails to
07 demonstrate error with respect to the development of the record.

08 Lay Witness Testimony

09 In the conclusion section of her brief, plaintiff states without elaboration that the ALJ failed
10 to properly consider the testimony of lay witnesses. (*See* Dkt. 11 at 20.) In response, the
11 Commissioner notes "several references to the statements of Plaintiff's mother involving Plaintiff's
12 activities of daily living and ability to help her mother after surgery[.]" and states: "Clearly, the
13 ALJ considered the lay witness testimony since it was used in the discussion of Plaintiff's abilities."
14 (Dkt. 15 at 11 (citing AR 22-23.))

15 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability
16 to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The
17 ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each witness.
18 *See Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996) (finding rejection of testimony of
19 family members because, *inter alia*, they were "'understandably advocates, and biased'" amounted
20 to "wholesale dismissal of the testimony of all the witnesses as a group and therefore [did] not
21 qualify as a reason germane to each individual who testified.") (citing *Dodrill v. Shalala*, 12 F.3d
22 915, 918 (9th Cir. 1993)). *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("[L]ay

01 testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account,
02 unless he or she expressly determines to disregard such testimony and gives reasons germane to
03 each witness for doing so.") Moreover, as recently found by the Ninth Circuit: "[W]here the
04 ALJ's error lies in a failure to properly discuss competent lay testimony favorable to the claimant,
05 a reviewing court cannot consider the error harmless unless it can confidently conclude that no
06 reasonable ALJ, when fully crediting the testimony, could have reached a different disability
07 determination." *Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

08 Here, the ALJ described the testimony of plaintiff's mother as follows:

09 The claimant's mother testified that she sees the claimant almost every week. She
10 also talks to her on the telephone. She said that the claimant could get angry in a
11 second and start throwing things. She is different since she started medication, but
12 it still happens. Almost every time she sees the claimant, she has problems with
13 temper flares. She takes the claimant shopping. She said that the claimant helped her
out when she had surgery and she did well, but it was a big burden for her. She said
that [t]he claimant has talked about her joints and back hurting her. She said that the
claimant has had problems with concentration for years. She said that the claimant
lived in an abusive household as a child.

14 (AR 22.) (*See also* AR 381-86 (testimony of plaintiff's mother.)) However, the ALJ does not
15 elsewhere address this testimony.

16 The ALJ erred in failing to provide germane reasons for rejecting the testimony of
17 plaintiff's mother, particularly given that it largely corroborates plaintiff's testimony regarding her
18 difficulty in interacting with others. Further, it cannot be said that no reasonable ALJ, upon fully
19 crediting the testimony of plaintiff's mother, would have reached a different disability
20 determination.

21 In addition, the record contains a "Daily Activities Questionnaire" completed by a friend
22 of plaintiff. (*See* AR 110-14.) In that questionnaire, the friend addresses, *inter alia*, plaintiff's

01 depression, symptoms, memory problems, anger, frustration, and minimal daily activities. (*Id.*)
02 However, it does not appear that the ALJ ever considered this questionnaire, as the decision
03 contains no discussion of or citation to this document.

04 This matter should be remanded to allow for further consideration of the testimony of
05 plaintiff's mother and the questionnaire submitted by her friend. However, the record does not
06 warrant crediting this testimony as true because, even doing so, the record does not support a
07 finding of disability. *Compare, e.g., Schneider v. Commissioner of Social Sec. Admin.*, 223 F.3d
08 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect required
09 by the federal regulations, it becomes clear that the severity of [plaintiff's] functional limitations
10 is sufficient to meet or equal [a listing.]"); *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)
11 (ALJ's reasoning for rejecting subjective symptom testimony, physicians' opinions, and lay
12 testimony legally insufficient; finding record fully developed and disability finding clearly required),
13 *with Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further
14 determinations where there were insufficient findings as to whether plaintiff's testimony should
15 be credited as true); *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1278
16 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in
17 that some of his stated reasons for rejecting a physician's opinion were legally insufficient).

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CONCLUSION

For the reasons set forth above, this matter should be REMANDED for further administrative proceedings.

DATED this 15th day of November, 2006.

A handwritten signature in black ink, appearing to read 'Mary Alice Theiler', written over a horizontal line.

Mary Alice Theiler
United States Magistrate Judge